IN THE COURT OF APPEALS OF IOWA

No. 3-1022 / 13-0661
Filed January 23, 2014

MGM APARTMENTS, LLC,
an Iowa Limited Liability Company,
Plaintiff-Appellant,

vs.

MID-CENTURY INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

This case comes before the court on appeal from the district court's order granting summary judgment in favor of Mid-Century Insurance Company and adverse to MGM Apartments, LLC. **AFFIRMED.**

Robert Livingston and Richard Crowl of Stuart Timley Law Firm, L.L.P., Council Bluffs, for appellant.

Jason Miller and Harry Perkins III of Patterson Law Firm, L.L.P., Des Moines, for appellee.

Heard by Vogel, P.J., and Mullins and McDonald, JJ.

McDONALD, J.

This case comes before the court on appeal from the district court's order granting summary judgment in favor of Mid-Century Insurance Company ("Mid-Century") and adverse to MGM Apartments, LLC, ("MGM"). The district court held that a loss suffered by MGM was excluded from coverage under an apartment owner's policy sold by Mid-Century to MGM. We affirm the judgment of the district court.

I.

MGM owns apartments located in Council Bluffs, Iowa. MGM purchased an apartment owner's insurance policy from Mid-Century to insure the apartment complex from the period of February 18, 2011 to February 18, 2012. In the summer of 2011, ground water levels around the apartment complex became unusually high. On or about July 7, 2011, these water levels caused a sewage lift station near the apartment complex to fail, which resulted in sewage backflow and water infiltration damage to the apartment complex. MGM submitted a claim under the policy to Mid-Century. Mid-Century denied the claim on the grounds that the loss was an excluded cause of loss pursuant to two exclusions in the policy.

MGM filed this action. In its amended petition, MGM asserted a claim for breach of contract arising out of Mid-Century's denial of MGM's claim. MGM also asserted a claim for coverage under the doctrine of reasonable expectations. Mid-Century filed its motion for summary judgment, arguing that several policy provisions unambiguously excluded coverage for MGM's loss. These exclusions related to loss caused directly or indirectly by earth movement, water, mudslide,

mudflow, wear and tear, rust, corrosion, decay, deterioration, settling, cracking, and mechanical breakdown. Mid-Century further argued that the doctrine of reasonable expectations was not applicable here. In its resistance to summary judgment, MGM argued only that an exception to the earth movement exclusion applied and coverage should be extended pursuant to the doctrine of reasonable expectations. MGM did not address the other exclusions raised by Mid-Century. The district court addressed only the earth movement exclusion; held that the exception to the earth movement exclusion did not apply and that MGM's loss was thus excluded; held that MGM failed to create a triable issue of fact under the doctrine of reasonable expectations; and granted Mid-Century's motion for summary judgment.

II.

We review the district court's grant of summary judgment for corrections of errors at law. *See Boelman v. Grinnell Mut. Reins. Co.*, 826 N.W.2d 494, 500 (Iowa 2013). Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). The party seeking summary judgment has the burden of establishing that the facts are undisputed and that the party is entitled to judgment as a matter of law. *See Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 677 (Iowa 2004). When a motion for summary judgment is made and properly supported, however, the opposing party may not rest upon the mere allegations or denials of the pleadings. *See* Iowa R. Civ. P. 1.981(5); *Bitner v.*

Ottumwa Cmty. Sch. Dist., 549 N.W.2d 295, 299 (Iowa 1996). Instead, the resisting party must set forth specific, material facts, supported by competent evidence, establishing the existence of a genuine issue for trial. *See* Iowa R. Civ. P. 1.981(5); *Bitner*, 549 N.W.2d at 299.

The court views the summary judgment record in the light most favorable to the party resisting the motion for summary judgment and indulges in every legitimate inference the evidence will bear in an effort to ascertain the existence of a genuine issue of fact. *See Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000). "A fact is 'material' if it will affect the outcome of the suit, given the applicable law." *Parish v. Jumpking, Inc.*, 719 N.W.2d 540, 543 (Iowa 2006). An issue of fact is "genuine" if the evidence would allow a reasonable jury to return a verdict for the nonmoving party. *See Fees v. Mut. Fire & Auto. Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992). If the summary judgment record shows that the "resisting party has no evidence to factually support an outcome determinative element of that party's claim, the moving party will prevail on summary judgment." *Wilson v. Darr*, 553 N.W.2d 579, 582 (Iowa 1996); Iowa R. Civ. P. 1.981(3). In addition, summary judgment is correctly granted where the only issue to be decided is what legal consequences follow from otherwise undisputed facts. *See Emmet Cnty. State Bank v. Reutter*, 439 N.W.2d 651, 653 (Iowa 1989).

III.

The standards for interpreting and construing insurance policies are well established, and they need not be repeated at any great length here. *See Boelman*, 826 N.W.2d at 501-02. As relevant here, however, we note "when an

insurer has affirmatively expressed coverage through broad promises, it assumes a duty to define any limitations or exclusionary clauses in clear and explicit terms." *Bituminous Cas. Corp. v. Sand Livestock Sys, Inc*., 728 N.W.2d 216, 220 (Iowa 2007) (alteration omitted). Exclusions from coverage are thus construed strictly against the insurer. *See LeMars Mut. Ins. Co. v. Joffer*, 574 N.W.2d 303, 307 (Iowa 1998). However, if the exclusions are clear and unambiguous, the court will enforce them as written and not write a new contract of insurance for the parties. *See Boelman*, 826 N.W.2d at 502.

The insurance policy at issue is an all-risks insurance policy. It provides that Mid-Century "will pay for direct physical loss of or damage to COVERED PROPERTY . . . resulting from any COVERED CAUSE OF LOSS." The policy defines a "COVERED CAUSE OF LOSS" as "Risks of Direct Physical Loss unless the loss is" limited or otherwise excluded. The policy sets forth various limitations in the policy's limitations section. The policy sets forth various exclusions in the policy's exclusion section. The policy provides that the exclusions operate without regard to "any other cause or event that contributes concurrently or in any sequence to the loss." The policy also provides "additional coverages" for certain, specified causes of loss without regard to any applicable exclusions or other limitations.

One of the exclusions on which Mid-Century relies provides that Mid-Century will not pay for loss or damage caused directly or indirectly by "[a]ny earth movement (other than sinkhole collapse) such as an earthquake, landslide, mine subsidence or earth sinking, rising or shifting." MGM argues that summary judgment was not proper because the term "sinkhole collapse" is ambiguous.

The thrust of MGM's argument centers around the issue of whether "sinkhole collapse," as used in the exception to the earth movement exclusion, is a defined term within the policy or whether it should carry its ordinary meaning. The ambiguity is created, MGM argues, because the policy specifies that words in quotation marks have specially-defined meanings. "Sinkhole collapse" is a defined term within the policy, but the phrase "sinkhole collapse," as used in the exception to the earth movement exclusion, is not contained within quotation marks. MGM argues, "sinkhole collapse," as used in the exception to the earth movement exclusion, by implication, carries its ordinary meaning. In support of its resistance to summary judgment, MGM submitted affidavits showing that the lift station failure was caused by water creating a sinkhole.

The exact issue raised by MGM here was litigated in *Ruede v. City of Florence*, 220 P.3d 113, 117 (Or. Ct. App. 2009), and we find the reasoning in that case persuasive and adopt it here, *see id*. We conclude that the phrase is a defined term, that the phrase is not ambiguous, that the loss is excluded by the earth movement exclusion, and that the district court properly granted summary judgment. We do not address MGM's argument in any great detail because even if MGM were correct that the term "sinkhole collapse" is ambiguous, the argument is not material to our resolution of this case.

As MGM has framed the issue, even if MGM proved the loss at issue fell within the "sinkhole collapse" exception to the earth movement exclusion, then it has proved only that the earth movement exclusion does not apply. That fact, in and of itself, does not mean MGM is entitled to coverage. Nor does it mean that

other exclusions in the policy are not applicable. Indeed, the policy explicitly provides that multiple exclusions may apply to a single loss.

In its motion for summary judgment and on appeal, Mid-Century argues that two other exclusions independent of the earth movement exclusion bar recovery by MGM. MGM did not respond to these arguments in resisting summary judgment, and the district court did not address these arguments in resolving Mid-Century's motion for summary judgment. However, "we may affirm the summary judgment ruling on a proper ground urged below but not relied upon by the district court." *Kern v. Palmer Coll. of Chiropractic*, 757 N.W.2d 651, 662 (Iowa 2008)

Mid-Century argues the exclusion for "other types of loss" caused by "wear and tear, rust, corrosion, decay, deterioration, settling, cracking and mechanical breakdown" bars recovery under the policy. In support of its motion for summary judgment, Mid-Century introduced evidence showing the sewer lift station failed due to rust, corrosion, decay, and deterioration. In resisting summary judgment, MGM introduced evidence showing the sewer lift station failed because high water levels damaged the lift station. If this matter were to proceed to trial, Mid-Century might be able to prove the applicability of this exclusion, but we conclude disputed issues of material fact preclude judgment as a matter of law with respect to this issue. *See Parish*, 719 N.W.2d at 542. Accordingly, we do not rely on this argument in affirming summary judgment.

Mid-Century also argues that coverage is excluded pursuant to the water exclusion: "we will not pay for loss or damage caused directly or indirectly by any of the following: (a) water, in any form; or (b) mudslide or mudflow." In resolving

a motion for summary judgment, we view the facts in the light most favorable to the party resisting the motion. MGM's theory of the case, and the evidence it introduced in resisting summary judgment, showed that water caused the lift station to collapse either by creating a sinkhole near the lift station or by causing sand boils near the lift station. MGM's expert opined that the lift station collapsed because of "groundwater undermining structures" and "an undermining of the soils by groundwater." It is also not disputed that the damage to the apartment complex itself was caused by water and sewage infiltration. Thus, there is no disputed issue of fact that the loss was caused directly or indirectly by water. Therefore, the water exclusion is applicable, and Mid-Century is thus entitled to judgment as a matter of law. *See*, *e.g.*, *Duensing v. State Farm Fire & Cas. Co.*, 131 P.3d 127, 134 (Okla. Civ. App. 2005) (holding concurrent exclusions enforceable); *State Farm Fire & Cas. Co. v. Bongen*, 925 P.2d 1042, 1044 (Alaska 1996) (same).

MGM argues that summary judgment was not proper because it has created an issue of material fact as to whether it is entitled to coverage under the additional coverages provision for collapse caused by certain specified causes of loss. MGM did not raise this argument in the district court, and we will not consider the issue on appeal. *See Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 642 (Iowa 1996) (stating the court will not consider an issue raised for the first time on appeal). MGM also did not raise this argument in its main appeal brief. We will not consider arguments raised for the first time in a reply brief. *See id.*

IV.

MGM argues coverage is created by the doctrine of reasonable expectations. The doctrine of reasonable expectations is only used when an exclusion is "(1) bizarre or oppressive, (2) eviscerates terms explicitly agreed to, or (3) eliminates the dominant purpose of the transaction." *Postell v. Am. Family Mut. Ins. Co.*, 823 N.W.2d 35, 47 (Iowa 2012) (citation and internal quotation marks omitted). "The doctrine is carefully circumscribed and does not contemplate the expansion of coverage on a general equitable basis." *Id.* (citation and internal quotation marks omitted). "For the doctrine to apply, a prerequisite must first be satisfied. *The insured* must prove circumstances attributable to the insurer that fostered coverage expectations or show that the policy is such that an ordinary layperson would misunderstand its coverage." *Boelman*, 826 N.W.2d at 506 (alteration omitted).

MGM has not created a triable issue of fact on the issue of whether Mid-Century fostered any coverage expectations. MGM has not identified any particular representation made during the sales transaction regarding the type of loss at issue or any of the exclusions at issue. *See Postell*, 823 N.W.2d at 47-48 (stating relevant representations would include those made at the point of sale). MGM did not identify any marketing materials issued by Mid-Century regarding the type of loss at issue or any of the exclusions at issue. In short, the summary judgment record is wholly bereft of any evidence establishing any circumstance attributable to Mid-Century that fostered any expectation regarding the loss at issue or the exclusions at issue. *See Am. Fam. Mut. Ins. Co. v. Corrigan*, 697 N.W.2d 108, 118-19 (Iowa 2005) (reversing district court and remanding for entry

of summary judgment in favor of insurer where there was no evidence that insurer made any representations regarding the exclusion to the insured).

MGM argues the policy is such that an ordinary person would misunderstand the scope of the earth movement exclusion. MGM again limits its argument to the "sinkhole collapse" exception to the earth movement exclusion. MGM does not address the operation and legal effect of the other exclusions applicable to this loss. The policy explicitly provides that the exclusions operate independent of one another. Thus, MGM's argument regarding its expectations regarding the construction of the earth movement exclusion fails to generate a material issue of fact because MGM does not deny that the other exclusions would apply. MGM's expectation of coverage related to earth movement cannot override the plain language of other policy provisions excluding coverage for this loss. *See Chase v. State Farm Fire & Cas. Co.*, 780 A.2d 1123, 1132 (D.C. 2001).

V.

For the foregoing reasons, we affirm the district court's order granting summary judgment in favor of Mid-Century and adverse to MGM.

AFFIRMED.